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IN THE

Supreme Court of the United States

October Term, 1969
No. 433

P. S. SEYMOUR-HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN PUMICE COMPANY, and GEORGE T. GOGGIN, Trustee in Bankruptcy for Trans-Pacific Corporation and Communications Equipment Corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner P. S. Seymour-Heath to Opposition of the United States of America and Response of George T. Goggin, as Trustee, to Petition for Certiorari.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The United States of America and George T. Goggin, as trustee in bankruptcy, have filed separate oppositions to the Petition for Certiorari of P. S. Seymour-Heath. This is a reply to both.

I.

The Facts Are Not Disputed.

George T. Goggin, as trustee in bankruptcy for the bankrupt corporations involved ("Goggin"), and the United States of America ("Government") both attempt to go outside the record. The record before the Court consists of the Affidavit of P. S. Seymour-Heath, the Motion To Recall Mandate and the Points and Authorities in Support of the Motion To Recall Mandate. Goggin did not file any opposition of any kind to the Motion To Recall Mandate although he was duly served and the referee was notified of the Motion. The subsequent acts of Goggin were taken at his peril and at the peril of the referee. The facts claimed in the Affidavit were admitted and the essential facts are again admitted in the response of Goggin.

The Government did not deny any of the facts claimed in the Motion and for the first time suggests that, "The United States presented valuations from $19,600 to $21,200." This is the first suggestion of these figures as far as we know. As far as the record is concerned, the Government admitted the Affidavit of petitioner by its failure to deny.

The Affidavit of petitioner in support of the Motion To Recall [certified by the Clerk of the Court of Appeals under Rule 21] commencing at page 5, states:

> "As a result of the failure of Messrs. Hansen and Dolle to carry forward the appeal of American Pumice, the position and claims of Heath and the

true measure of recovery in the proceedings in the United States District Court for the Central District of California were never submitted to nor considered by this Court. On the contrary, this Court had before it on appeal a very narrow issue which did not consider the major points necessary to be considered in order to determine the propriety of the claims of Heath. This Court affirmed the judgment of the District Court November 15, 1968, on the appeal of the United States only. The mandate was spread January 28, 1969.

"In and by the record in this case and the position [of the] said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000.00 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000.00, making a grand total in excess of $2,860,000.00. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000.00 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court in the sum of $167,200.00 plus interest at six percent approximating $198,000.00, or a total of $360,000.00."

To this (and the whole Motion) the Government responded:

"OPPOSITION OF UNITED STATES TO MOTION TO RECALL THE MANDATE AND FOR OTHER RELIEF

"The United States herewith opposes the motion of P. S. Seymour-Heath, filed on or about

April 23, 1969, to recall the mandate and for other relief on the ground of excessive lateness and because the matter of an appeal by Seymour-Heath was settled by this Court in *P. S. Seymour-Heath v. Goggin,* 389 F.2d 327 (January 10, 1968). In the event that P. S. Seymour-Heath should be allowed to prosecute an appeal, since defense on the merits to that appeal would inevitably raise again issues presented in the Government's appeal, we would respectfully urge a rehearing of that appeal.

"Respectfully submitted,"

This does not counter in any fashion the statements of fact contained in Mr. Heath's Affidavit. On the contrary, it is suggested by the Government that the issues involved in its case which were decided adversely to it on the appeal [Petition, Appendix II] would have supported the position of Heath had he been represented before the Court of Appeals and had his case been presented.

Goggin did not respond to the Motion at all. We must therefore conclude that before the Court of Appeals he admitted everything contained in the Motion.

We are at a loss to understand why Goggin should now seek to prevent review and certiorari in this Court. The fact that he has underscores what amounts to a continuous effort to prevent petitioner's presenting for determination his rights in the condemnation case, his right to representation, his right to counsel, and his right to the rewards of the compromise of October 20, 1959.

II.

The Government and Goggin Have Destroyed Petitioner's Right of Due Process.

In their respective responses to the Petition for Certiorari, Goggin and the Government have themselves relied upon an order procured by Goggin which effectively destroyed the rights of petitioner under the decree of October 20, 1959, and prevented his case being heard by the Court of Appeals as a part of the condemnation case. In their respective responses, both quote from an order procured by Goggin and the attorneys who tried the case for the American Pumice Company, as follows:

> "If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U.S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands." [Government's Opposition, page 4; Goggin's Response, page 4]

We call the Court's attention to the fact that this order required a $225,000 bond to prevent "any diminution from the award as it presently stands." That bond was to be posted and paid for by P. S. Seymour-Heath which was of course an impossibility for him and thereby made it impossible for Heath to proceed. That order also provided as quoted in Goggin's Response, the following, which prevented Messrs. Hansen and Dolle representing the interests of Heath as they were re-

quired to do under the October 20, 1959, order. Thus, the referee ordered July 30, 1965:

> "1. That special counsel proposed (by Heath) to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;
>
> "2. That there be no appeal upon behalf of the trustee in said action;
>
> "3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;" [Goggin's Response, page 4]

That the order of July 30, 1965, was a clear violation of the order of October 20, 1959, is clear from the quotation from that order contained in the Government's Opposition on page 3:

> "AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all costs, expense and liability of every kind which might be incurred with such procedure * * *."

We call the Court's attention to the fact that the bond provided in the order of October 20, 1959, was to indemnify against ". . . cost, expense and liability . . .". Such a bond would be small and relatively inexpensive and one within the means of Heath. Instead, counsel that were supposed to protect the rights of Heath procured an order which prevented an appeal on his behalf unless he posted a bond which would prevent ". . . any

diminution from the award as it presently stands . . ." This was a requirement that petitioner guarantee the results on appeal when there was no such provision in the order of October 20, 1959. This was simply a means of destroying petitioner's right of due process. We call the Court's attention to the fact that in our moving papers in the court below, this very point was set out and not controverted by either the Government or Goggin. [Motion To Recall Mandate, page 12, line 24, to page 13, line 16.]

Further violation of the order of October 20, 1959, by the order of July 30, 1965, is apparent from the direction above that Messrs. Hansen and Dolle are to represent the trustee (as distinguished from American Pumice which was to be the vehicle by which Goggin and Heath were represented). Other violations are found by the opinion of the Court of Appeals January 10, 1968. [Petition, Appendix III.]

III.

The Petition for Certiorari Should Be Granted.

We believe that the opposition of the Government and the response of Goggin clearly show that in spite of the order of compromise of October 20, 1959, which established the rights of the parties and particularly the right of Heath to counsel and to be heard and to advance his position, the Government and Goggin simply destroyed those rights. In addition, the referee in bankruptcy aided this destruction by the order of July 30, 1965.

There is thus no question but that petitioner's right of due process was effectively blocked and destroyed. Even counsel who represented American Pumice (Messrs.

Hansen and Dolle) and who were appointed for that very purpose in order to protect both the rights of Goggin and petitioner have stated in their petition for fees that at no time did they represent petitioner. Instead, they represented solely the interests of Goggin. [Affidavit of R. S. Seymour-Heath, page 7, line 12, to page 8, line 2.]

This surely falls directly within the doctrine of the *United States v. Throckmorton,* 98 U.S. (8 Otto) 61, 25 L. Ed. 93, and the host of cases which follow that doctrine. This doctrine requires that the mandate be recalled and that the petitioner be given a right to present his case to the Court of Appeals.

We also submit that taking the petition and the admissions in the opposition and response of the Government and Goggin, respectively, neither the trial court nor the Court of Appeals has recognized the effect of the order of October 20, 1959, held to be *res judicata* by the Court of Appeals in *P. S. Seymour-Heath v. Goggin, Trustee etc.* [Appendix III of Petition.]

We earnestly suggest that a full opinion of the Court is needed to establish civil rights of due process in civil litigation particularly where the effect of the denial of those rights is to deny a civil litigant the right to counsel, the right to prepare and submit his case on appeal, and the right to rely upon a *res judicata* order of a trial court. The solemn pronouncements of our courts should not be subject to the whim or caprice of more powerful litigants.

Wherefore, petitioner prays that certiorari be granted so that this matter may be briefed and argued *in extenso* before this Honorable Court.

Respectfully submitted,

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